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8

9 **UNITED STATES BANKRUPTCY COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**  
11 **SAN FRANCISCO DIVISION**

12 In re:

13 GABRIEL TECHNOLOGIES  
CORPORATION *et al.*,

14 Debtors.  
15

16 E.I.N. 22-3062052; 20-1711149  
17

Case No. 13-30340-DM

(Jointly Administered with Case No. 13-30341)

Chapter 7 Proceedings

**NOTICE OF HEARING ON CHAPTER 7  
TRUSTEE'S MOTION FOR APPROVAL OF  
SETTLEMENT WITH HUGHES HUBBARD &  
REED LLP**

**[Fed. R. Bankr. P. 9019]**

[Motion, Memorandum of Points and Authorities, and  
supporting Declarations filed concurrently herewith]

Hearing:

Date: September 16, 2016

Time: 10:00 a.m.

Place: Courtroom 17

United States Bankruptcy Court  
450 Golden Gate Avenue, 16<sup>th</sup> Floor  
San Francisco, California 94102

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1 **TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY COURT**  
2 **JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, AND ALL PARTIES IN**  
3 **INTEREST:**

4 **PLEASE TAKE NOTICE** that on September 16, 2016 at 10:00 a.m. in Courtroom 17 of  
5 the United States Bankruptcy Court located at 450 Golden Gate Avenue, 16<sup>th</sup> Floor, San Francisco,  
6 California 94102, Kavita Gupta, the chapter 7 trustee (the "Trustee") for the bankruptcy estates of  
7 Debtor Gabriel Technologies Corporation, Bankruptcy Case No. 13-30340, and Debtor Trace  
8 Technologies, LLC, Bankruptcy Case No. 13-30341 (collectively, the "Estates"), pursuant to Rule  
9 9019 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 105, will and hereby does  
10 move for the entry of an order authorizing and approving a settlement (the "Settlement") by and  
11 between the Trustee and Hughes Hubbard & Reed LLP ("Hughes Hubbard"), and for a finding that  
12 the Settlement is fair and reasonable and in the best interest of the creditors of the Estates (the  
13 "9019 Motion"). The Settlement resolves any and all claims that the Trustee asserts the Estates  
14 have or may have against the Debtors' former counsel, Hughes Hubbard, including certain present  
15 and former lawyers at Hughes Hubbard and others related to Hughes Hubbard, in connection with  
16 and arising out of (a) its representation of the Debtors in the action entitled *In re Gabriel*  
17 *Technologies Corporation and Trace Technologies, LLC v. Qualcomm Incorporated, Snaptrack,*  
18 *Inc. and Norman Krasner*, Case No. 08-CV-1992, which was pending in the United States District  
19 Court for the Southern District of California, and the appeal thereof entitled, *Gabriel Technologies*  
20 *Corporation and Trace Technologies, LLC v. Qualcomm Incorporated, Snaptrack, Inc. and*  
21 *Norman Krasner*, Case No. 13-1205, which was pending in the United States Court of Appeals for  
22 the Federal Circuit (the "Action"), and (b) their alleged efforts and opinions provided to secure  
23 funds from any Person or entity to pay the fees, expenses and costs of the Action.

24 **PLEASE TAKE FURTHER NOTICE THAT ANY PARTY INTERESTED IN**  
25 **RECEIVING A COPY OF THE 9019 MOTION AND ANY SUPPORTING PLEADINGS**  
26 **AND DOCUMENTATION MAY CONTACT SPECIAL LITIGATION COUNSEL FOR THE**  
27 **TRUSTEE, WHOSE NAME AND CONTACT INFORMATION APPEARS ON THE**  
28

1 **FRONT, TOP LEFT CORNER OF THIS NOTICE, AND WHO WILL PROVIDE SUCH**  
2 **COPIES UPON REQUEST.**

3 **PLEASE TAKE FURTHER NOTICE** that the Settlement is memorialized in a  
4 Settlement Agreement, a true and correct copy of which is attached as Exhibit 1 to the Declaration  
5 of Kavita Gupta (the "Gupta Declaration"), the terms of which are incorporated herein by reference  
6 (the "Settlement Agreement").

7 **PLEASE TAKE FURTHER NOTICE THAT** all parties in interest are directed to the  
8 Settlement Agreement for the specific terms of the Settlement Agreement. A summary of the  
9 essential terms in the Settlement Agreement are set forth below. To the extent that any terms listed  
10 below are inconsistent with the Settlement Agreement, the terms of the Settlement Agreement  
11 govern:

- 12 1. The Settlement Agreement is conditional upon the Bankruptcy Court's approval of  
13 the Settlement Agreement pursuant to Federal Rule of Bankruptcy Procedure 9019.
- 14 2. The Settlement Agreement is conditional upon the Bankruptcy Court's finding that  
15 the Settlement Agreement was entered into in good faith, pursuant to California  
16 Code of Civil Procedure § 877.6.
- 17 3. Hughes Hubbard shall pay the Trustee the total sum of \$7,250,000.00 (the  
18 "Settlement Amount") within five business days after: (a) the Court order approving  
19 this Settlement Agreement becomes Final, and (b) a Court order approving the  
20 Good Faith Settlement Motion becomes Final.
- 21 4. Hughes Hubbard will waive any claim it has or may have against the Debtors or  
22 their Estates in their bankruptcy cases. To the extent that Hughes Hubbard filed a  
23 claim(s), such claims are disallowed in their entirety.
- 24 5. The Parties have agreed to mutual and general releases and a Civil Code § 1542  
25 waiver.
- 26 6. There is a carve-out regarding claims against certain parties as provided for in  
27 paragraphs 7 and 8 of the Settlement Agreement.
- 28 7. Each Party will bear its own fees, costs and expenses.

1 8. The Bankruptcy Court will retain jurisdiction to enforce the terms of the Settlement  
2 Agreement.

3 **PLEASE TAKE FURTHER NOTICE** that, as set forth in full in the Gupta Declaration  
4 and the Declaration of Larry W. Gabriel ("Gabriel Declaration") filed concurrently herewith, in  
5 determining to enter into the Settlement, the Trustee has analyzed the reasonableness of the  
6 Settlement and has considered the four factors established by the Ninth Circuit in *Martin v. Kane*  
7 (*In re A&C Properties*), 784 F.2d 1377 (9th Cir. 1986) ("A&C Properties"), including: (a)  
8 probability of success in litigation; (b) the difficulties, if any, to be encountered in collection; (c)  
9 the complexity of the litigation, and the expense, inconvenience and delay attending it; and (d) the  
10 paramount interests of creditors, and has concluded,<sup>1</sup> as follows:

11 Federal Rule of Bankruptcy Procedure 9019 states, in relevant part, that "[o]n  
12 motion by the trustee and after notice and a hearing, the court may approve a  
13 compromise or settlement." Under Rule 9019(a), the Bankruptcy Court has  
14 "great latitude in approving compromise agreements" and may approve a  
15 proposed compromise so long as it is fair and equitable. *Woodson v.*  
16 *Fireman's Fund Insurance Co. (In re Woodson)*, 839 F.2d 610, 620 (9th Cir.  
17 1987).

18 The Ninth Circuit has set forth certain factors relevant to determining whether  
19 a settlement is fair and equitable. In determining whether a settlement is fair  
20 and equitable and in the best interests of the estate and creditors, the court  
21 must consider: "(a) the probability of success in the litigation; (b) the  
22 difficulties, if any, to be encountered in the matter of collection; (c) the  
23 complexity of the litigation involved, and the expense, inconvenience and  
24 delay necessarily attending it; and (d) the paramount interest of creditors and a  
25 proper deference to their reasonable views in the premises." *Martin v. Kane*  
26 (*In re A&C Props.*), 784 F.2d 1377, 1381 (9th Cir. 1986), *overruled on other*  
27 *grounds by In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349  
28 (9th Cir. 1987).

29 The decision of whether to approve or reject a proposed compromise is  
30 addressed to the sound discretion of the Court and is to be determined by the  
31 particular circumstances of each case. *In re Walsh Construction, Inc.*, 669  
32 F.2d 1325, 1328 (9th Cir. 1982); *In re Woodson, supra*, at 620; *In re A & C*  
33 *Properties, supra*, at 1381.

34 In addressing the 9019 Motion, the Court need not decide the questions of law  
35 and fact raised in the controversies sought to be settled and need not  
36 determine whether the settlement presented is the best one that could possibly  
37 have been achieved. Rather, the Court's responsibility is only "to canvass the  
38 issues to see whether the settlement 'fall[s] below the lowest point in the

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<sup>1</sup> *Memorandum of Points and Authorities in Support of Chapter 7 Trustee's Motion for Approval of Settlement with Hughes Hubbard & Reed LLP*, pp. 9-13.

1 range of reasonableness.”” *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir.  
2 1983) (quoting *Newman v. Stein*, 464 F.2d 683, 693 (2d Cir. 1972); see *In re*  
3 *Milden*, 111 F.3d 138, 2 (9th Cir. 1997); *In re Pac. Gas and Elec. Co.*, 304  
4 B.R. 395, 417 (Bankr. N.D. Cal. 2004). The bankruptcy court need not  
conduct an exhaustive investigation into the validity or a mini-trial on the  
merits of the claims sought to be compromised. *In re Walsh Constr.*, 669 F.2d  
at 1328.

5 An analysis of the *A&C Properties* factors in this case, as set forth below and  
6 in the Gupta Declaration, demonstrates that the settlement is fair and  
equitable, and should be approved.

### 7 **A. The Probability of Success in the Litigation**

8 The Settlement Agreement represents the product of an extensive evaluation  
9 of the potential claims the Estates have or may have against Hughes Hubbard.  
10 (Gupta Declaration, ¶ 15.) The Trustee believes that it is probable that she  
11 would prevail if she pursued litigation against Hughes Hubbard. *Id.* The  
12 claims themselves present fairly straight-forward issues as to Hughes  
13 Hubbard’s advice as to the propriety of continuing litigation after the Bond  
14 Order was issued by the District Court. *Id.* However, the Trustee recognizes  
15 that, as with all litigation, the outcome is ultimately uncertain and ultimately  
16 rests with the trier of fact. *Id.* The claims would likely require expert  
17 testimony, likely with two or three experts providing testimony on the issue of  
18 patent law, legal malpractice and billing practices. (Gabriel Declaration, ¶ 7.)  
19 In addition, it is possible that the claims would have to be arbitrated given the  
20 terms of the Hughes Hubbard’s retention agreement with the Debtors. (Gupta  
21 Declaration, ¶ 18; Gabriel Declaration, ¶¶ 7, 10.) That agreement requires  
22 that the arbitration take place in New York, with New York law being applied  
23 to the claims presented. *Id.* Such an arbitration may result in increasing the  
24 expense for the prosecution of the claims, require the need to retain local  
25 counsel, and subject the claims to the vagaries of New York law. (Gabriel  
26 Declaration, ¶ 8.) Moreover, even if the Trustee prevailed in litigation against  
27 Hughes Hubbard, the amount of recovery is subject to dispute. (Gupta  
28 Declaration, ¶ 15; Gabriel Declaration, ¶ 8.) The Trustee has also analyzed  
the damage claim that could be pursued *vis a vis* the Hughes Hubbard claims.  
(Gupta Declaration, ¶ 16.) It is the Trustee’s view that the approximate range  
of the Estates’ potential damages against Hughes Hubbard is between \$13  
million - \$20 million. (Gupta Declaration, ¶ 16; Gabriel Declaration, ¶ 8.)  
That amount includes the \$13 million Fee Order, interest on the Fee Order  
from the date it was entered, attorney fees, and the additional debt (now  
claims) the Debtors would not have otherwise incurred but for the  
continuation of the Action. *Id.* Hughes Hubbard has asserted numerous  
defenses to the claims. (Gabriel Declaration, ¶ 9.) For example, it will likely  
contend that the Fee Order erroneously included approximately \$5 million in  
fees that were incurred prior to the Bond Order and that Fitzgerald, not  
Hughes Hubbard, is liable for failing to recognize and challenge this error. *Id.*  
Hughes Hubbard may further contend that the Debtors’ board of directors was  
fully advised of the risk of litigation and that the Debtors would have likely  
continued with the Action because they had no profitable business operations.  
*Id.* Taking litigation risk and the time value of money into consideration, the  
Trustee believes that the settlement of \$7.25 million represents a reasonable  
and fair compromise that is between 36% - 56% of the Estates’ total potential  
claim against Hughes Hubbard. (Gupta Declaration, ¶ 16.) The settlement  
takes into account the probability of success in litigation, and the Trustee  
believes that it is in the best interests of the Estates and their creditors. (Gupta

1 Declaration, ¶¶ 15-19.) The Trustee does not believe that it is prudent to  
2 subject the Estates to the risks and costs associated with litigating the claims  
3 against Hughes Hubbard given the settlement amount of \$7.25 million should  
4 provide a substantial benefit to the creditors of the administratively insolvent  
5 estates. (Gupta Declaration, ¶ 16.) The Trustee believes, in her business  
6 judgment, that the proposed settlement is more beneficial to the Estates than  
7 the litigation of the claims against Hughes Hubbard. (Gupta Declaration, ¶¶  
8 16, 20.)

9 **B. The Difficulties, If Any, To Be Encountered In The Matter Of**  
10 **Collection.**

11 This test is not relevant. In the event of a judgment, the Trustee believes that  
12 she would be able to recover in full from Hughes Hubbard. (Gupta  
13 Declaration, ¶ 17.)

14 **C. The Complexity of the Litigation Involved and the Expense,**  
15 **Inconvenience and Delay Necessarily Attending It.**

16 The litigation against Hughes Hubbard would present fairly complex legal  
17 issues and hurdles. (Gupta Declaration, ¶ 18.) As has been made clear by  
18 Hughes Hubbard's counsel, the issues would be heavily litigated. (Gabriel  
19 Declaration, ¶ 10.) First, the Trustee will have to address a number of  
20 jurisdictional and choice of laws issues in regard to whether the claims would  
21 need to be arbitrated, and if so, where the arbitration would take place.  
22 (Gupta Declaration, ¶ 18; Gabriel Declaration, ¶ 10.) The retention agreement  
23 with Hughes Hubbard provides that any claim against the firm be arbitrated in  
24 New York, and that New York law applies. (Gupta Declaration, ¶ 18; Gabriel  
25 Declaration, ¶ 7.) The Trustee believes that the Bankruptcy Court should  
26 adjudicate the claims against Hughes Hubbard, but it is possible that Hughes  
27 Hubbard would prevail in its argument that the claims should be arbitrated in  
28 New York. (Gupta Declaration, ¶ 18; Gabriel Declaration, ¶ 10.) Arbitration  
is often time-consuming and extremely costly. *Id.* To the extent that the  
arbitration was to take place in New York, and if New York law was applied,  
the Trustee and her counsel would likely incur significant travel expenses, and  
may also need to retain local counsel in New York to advise as to New York  
law. (Gupta Declaration, ¶ 18; Gabriel Declaration, ¶ 7.)

The Trustee has claims against Fitzgerald as heretofore expressed. (Gupta  
Declaration, ¶ 12.) Fitzgerald's retainer agreement with the Debtors requires  
an arbitration of the claims against it to be held in San Diego County. *Id.*  
Motions, and potentially time-consuming appeals, could take place over  
whether the claims are to be arbitrated, whether the claims against Hughes  
Hubbard and the other firms must be jointly arbitrated, where the arbitration  
would take place, and what state's law would be applied. (Gabriel  
Declaration, ¶ 10.)

Moreover, it is possible Hughes Hubbard would seek to have a "trial within a  
trial" in order to prove causation. Although the Trustee does not believe that a  
"trial within a trial" approach would apply, if it did, such an approach would  
be time-consuming, would likely involve two or more expert witnesses on  
each side, and would be costly. (Gabriel Declaration, ¶ 11.) The expert  
witness costs would likely exceed several hundred thousand dollars, at a  
minimum, and could ultimately reach close to \$1 million depending on the  
number of expert witnesses needed. *Id.* Even though the Trustee's counsel is  
retained on a contingency fee basis, fees and costs for arbitration, expert



witnesses and other costs could be substantial if the Trustee were to litigate the claims against Hughes Hubbard. *Id.* In addition, while the Trustee is confident in her analysis of the claims and the likelihood of success on the merits, there is never any certainty to such claims, and the amount of the settlement is reasonable given the risks of litigation, and the years the litigation could take to conclude. (Gupta Declaration, ¶¶ 15-16; Gabriel Declaration, ¶ 11.)

The complexity of the litigation, expense, and potential delay due to issues regarding arbitration, all weigh in favor of resolving the claims against Hughes Hubbard to avoid significant cost, delay and risk. (Gupta Declaration, ¶¶ 15-19.) However, the amount of the settlement still must be fair and reasonable given the probability of success at trial. (Gupta Declaration, ¶ 18.) As discussed above, the Trustee believes that the Settlement Amount appropriately takes into account the range of potential outcomes for the claims taking into account the probability of success at trial. (Gupta Declaration, ¶¶ 18-19; Gabriel Declaration, ¶¶ 7-12.)

#### **D. Paramount Interests of Creditors.**

The Settlement Amount of \$7.25 million is significant and should provide for a substantial benefit to the Estates and creditors without the significant risks and costs of litigation. (Gupta Declaration, ¶ 19.) Given that the Estates are currently administratively insolvent, the Settlement Agreement should provide for a meaningful recovery for creditors of the Estates. *Id.* As will be set forth in a separate motion to approve a settlement agreement with WHGC,<sup>2</sup> the Trustee has also resolved her claims against WHGC. *Id.* The Settlement Agreement preserves the Trustee's ability to pursue her claims against Fitzgerald, which may result in additional recovery for the Estates. *Id.*

Based on the *A&C Properties* factors, the Settlement Agreement is fair and equitable and in the best interest of the Estates and their creditors. (Gupta Declaration, ¶ 20.)

**PLEASE TAKE FURTHER NOTICE THAT** approval of the Settlement and the Settlement Agreement is conditional upon approval by this Court of the Trustee's Motion for Determination of Good Faith Settlement (the "Good Faith Settlement Motion"), pursuant to California Code of Civil Procedure § 877.6 *et seq.*, which also is filed concurrently herewith.

**PLEASE TAKE FURTHER NOTICE** that the 9019 Motion is supported by this Notice, and the following documents filed concurrently herewith: (i) the 9019 Motion, (ii) the Memorandum of Points and Authorities in support of the 9019 Motion, (iii) the Gupta Declaration, (iv) the Gabriel Declaration, (v) the Request for Judicial Notice in Support of the 9019 Motion filed concurrently herewith, the entire record before the Court, those matters of which this Court

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<sup>2</sup> WHGC P.L.C. and Wang, Hartman, Gibbs & Cauley, P.L.C. (together, "WHGC")

1 may take judicial notice, and such further evidence and argument that may be presented at or  
2 before the hearing on this 9019 Motion.

3 **PLEASE TAKE FURTHER NOTICE that pursuant to Bankruptcy Local Rule 9014-**  
4 **1(c)(1), any opposition to the 9019 Motion shall be filed and served on Special Litigation**  
5 **Counsel for the Trustee at least 14 days prior to the hearing date. Any replies must be filed**  
6 **and served at least 7 days before the scheduled hearing date on the 9019 Motion. Any**  
7 **objection or request for a hearing must be accompanied by any declarations or memoranda**  
8 **of law any requesting party wishes to present in support of its position. If there is no timely**  
9 **objection to the requested relief, the court may enter an order granting the relief.**

10  
11 Dated: August 10, 2016

BRUTZKUS GUBNER

12  
13 By: /s/ Larry W. Gabriel

Larry W. Gabriel

14 Special Litigation Counsel for Kavita Gupta,  
15 Chapter 7 Trustee for the bankruptcy estates of  
16 Gabriel Technologies Corporation and Trace  
Technologies, LLC  
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